

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1297 CS

Indoor Smoking Places

SPONSOR(S): Sorensen

TIED BILLS:

IDEN./SIM. BILLS: SB 1348

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Business Regulation Committee</u>	<u>12 Y, 6 N</u>	<u>Shoemaker</u>	<u>Liepshutz</u>
2) <u>Commerce Council</u>	<u>6 Y, 2 N, w/CS</u>	<u>Morris</u>	<u>Bohannon</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

At the November 2002 General Election, voters approved Amendment No. 6, to prohibit tobacco smoking in enclosed indoor workplaces. The stated purpose of this constitutional revision, codified as s. 20, art. X, Florida Constitution, was to protect people from the health hazards of second-hand tobacco smoke by prohibiting workplace smoking. The constitutional amendment provided limited exceptions to the prohibition on indoor smoking for private residences, retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars. The constitutional amendment required the Legislature to implement the "amendment in a manner consistent with its broad purpose and stated terms." Implementing legislation was subsequently enacted by the 2003 Legislature. The constitutional amendment provided that a stand-alone bar is "...any place of business devoted during any time of operation predominantly or totally to serving alcoholic beverages... in which the serving of food, if any, is merely incidental to the consumption of any such beverage." The implementing legislation defined the term "merely incidental" to limit a stand-alone bar from deriving more than 10 percent of its gross revenue from the sale of food.

This bill expands the threshold of allowable food sales from 10 percent to 20 percent for a stand-alone bar that is located in a building that is individually listed in the National Register of Historic Places. The bill creates a window of opportunity to qualify for the expanded exception, by specifying that the stand-alone bar must have submitted an application to the Department of State seeking to obtain this designation on or before 90 days after the effective date of this act.

The bill also addresses several regulatory and enforcement provisions that have been identified as problematic since the Act initially took effect. The bill clarifies that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace. It defines the term "person" to have the same meaning as in the rule of statutory construction in s. 1.01, F.S. The bill applies the penalty provisions for stand-alone bars to alcoholic beverage vendors who permit smoking in alcoholic beverage licensed establishments. Under current law these penalties only apply to alcoholic beverage vendors who have received a stand-alone bar designation from the Division of Alcoholic Beverages and Tobacco [DABT] within the Department of Business and Professional Regulation.

The bill also provides that a law enforcement officer may issue a citation to any person who violates the provisions of the Clean Indoor Air Act and specifies the minimum information that a citation must contain. The bill provides that if any person refuses to comply with a proprietor's request to stop smoking, a law enforcement officer may remove the violator from the premises.

The bill repeals the requirement that designated stand-alone bars must file an "agreed upon procedures report" signed by a certified public accountant with the DABT every three years. The bill subjects a stand-alone bar's alcoholic beverage license to revocation or suspension under s. 561.29, F.S., if the stand-alone bar knowingly makes a false statement on the annual affidavit required by s. 561.695, F.S., attesting to the percentage of food sales.

This bill is not expected to have a significant fiscal impact on state or local governments and provides an effective date of July 1, 2005.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1297b.CC.doc

DATE: 4/14/2005

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty: This bill creates an exception to the 10 percent limitation on food sales permitted in “stand-alone bars” by allowing food sales of up to 20 percent for establishments that are individually registered on the National Register of Historic Places. According to the sponsor of the legislation and the DBPR, the bill will have limited application.

B. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Article X, Section 20 of the Florida Constitution

At the November 2002 General Election, voters approved Amendment No. 6,¹ to prohibit tobacco smoking in enclosed indoor workplaces. The stated purpose of this constitutional revision, codified as s.20, art. X, Florida Constitution, was to protect people from the health hazards of second-hand tobacco smoke by prohibiting workplace smoking. The constitutional amendment required the Legislature to implement the “amendment in a manner consistent with its broad purpose and stated terms.” The constitutional amendment provided limited exceptions to the prohibition on indoor smoking for private residences, retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars.

The constitutional amendment required that the implementing legislation have an effective date of no later than July 1, 2003. Further, the amendment required that the implementing legislation must provide civil penalties for violations; provide for administrative enforcement; and require and authorize agency rules for implementation and enforcement. It also allowed the Legislature to enact legislation more restrictive of tobacco smoking than that provided in the State Constitution.

The Legislature enacted Chapter No. 2003-398, Laws of Florida, effective July 1, 2003, which amended Part II of Chapter 386, F.S., the Florida Clean Indoor Air Act, and also created a new s. 561.695, F.S. of the Beverage Law. Section 386.207, F.S., provides for enforcement of the act by the Department of Business and Professional Regulation [DBPR] and the Department of Health [DOH] within each department’s specific areas of regulatory authority. The Divisions of Alcoholic Beverages and Tobacco and Hotels and Restaurants are the two divisions within the DBPR that have primary oversight authority. Stand-alone bars come within the regulatory jurisdiction of the Division of Alcoholic Beverages and Tobacco [division or DABT].

In addition to the exceptions specifically provided in the constitutional amendment, the implementing legislation created exceptions to the prohibition on smoking in enclosed indoor workplaces for: medical or scientific research; smoking cessation programs; airport customs smoking rooms; and, qualifying membership associations.

Smoking Violations by Patrons and Employees

A recent Division of Administrative Hearings (DOAH) decision has raised concerns regarding whether the DBPR has sufficient authority to sanction the proprietor or other person in charge of an enclosed indoor workplace with a violation of the act, if a person other than the proprietor or other person in charge of the location is smoking. Section 386.204, F.S., provides that a person may not smoke in an enclosed indoor workplace. Section 386.204, F.S., is the substantive smoking prohibition. Section 386.207(3), F.S., requires that the DBPR or the DOH, upon notification of observed violations of the

¹ The vote on Amendment No. 6 was 3,501,161 in favor and 1,431,966 against (71.0% to 29.0%).

act, issue to the proprietor or other person in charge of the enclosed indoor workplace a notice to comply with the act. Section 386.207(3), F.S., establishes fines for subsequent violations of the act.

In *DBPR v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*, DBPR attempted to discipline Old Cutler Oyster Co., an alcoholic beverage licensee, for permitting several patrons to smoke in the licensed premises in violation of s. 386.204, F.S. The licensee did not hold a stand-alone bar designation under s. 561.695, F.S. The Administrative Law Judge (ALJ), in his Recommended Order, held that there is no requirement in the statute that a proprietor or other person in charge of an enclosed indoor workplace must take any specific action when he or she observes a patron (or other non-employee) smoking in the enclosed indoor workplace. The ALJ also questioned whether the civil penalties in s. 386.207(3), F.S., which may be assessed against “the person” who fails to comply with a previously issued “notice to comply,” apply to corporate or other non-human juridical entities. The ALJ held that, in the context of s. 386.207(3), F.S., the term “person” appears to be limited to an individual human being. The Recommended Order does not reference the rule of statutory construction in s. 1.01, F.S., which provides that, where the context permits, the term person “includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.”

The division rejected the ALJ’s determination that the term “person” did not include a corporation. However, due to the criteria and limitations in s. 120.57(1)(l), F.S., for agency review of an ALJ’s findings of fact, conclusions of law, and recommended disposition, the division adopted the recommendations of the ALJ and dismissed the case.

Old Cutler Oyster Co., Inc., does not address the issue of whether the division can sanction an alcoholic beverage licensee under the division’s disciplinary authority in s. 561.29, F.S., which authorizes discipline of alcoholic beverage licensees for violations of any law in this state or permitting another person on the licensed premises to violate the laws of this state or the United States, and for maintaining a nuisance on the licensed premises. The division has previously utilized s. 561.29, F.S., to successfully sanction alcoholic beverage licensees for violations of state law by patrons and other non-employees on the licensed premises. Although the licensee in *Old Cutler Oyster Co., Inc.*, is an alcoholic beverage licensee, the division did not seek to discipline the licensee pursuant to s. 561.29, F.S.

The DOAH decision in *Old Cutler Oyster Co., Inc.*, is also relevant to the Department of Health’s (DOH) enforcement of the act. It creates uncertainty regarding the extent to which DOH can sanction proprietors and persons in charge of an enclosed indoor workplace for smoking violations by patrons or other non-employees.

Local Law Enforcement

According to the DBPR, certain unidentified local law enforcement agencies have expressed a reluctance to enforce the smoking ban by issuing the non-criminal citation authorized by s. 386.208, F.S., because they believe that the act does not grant local law enforcement officers sufficient jurisdiction to enforce the prohibition in s. 386.204, F.S.

Section 386.212, F.S., which prohibits smoking within 1,000 feet of school property, specifically authorizes law enforcement officers to issue a citation to any person violating this provision. Section 386.212(2), F.S., also specifies the minimum information that a citation must contain.

Food Service in Stand-Alone Bars

The constitutional amendment defined a stand-alone bar to mean:

...any place of business devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in

which the serving of food, if any, is merely incidental to the consumption of any such beverage; and that is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue.

Section 561.695, Florida Statutes, creates three specific requirements for a stand-alone bar. First, a stand alone bar must be “devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises.” Second, the serving of food, if any, must be “merely incidental” to the consumption of alcoholic beverages. Third, the business must not be “located within, [or] share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue.”

The important caveat of the stand-alone bar definition for the purposes of this bill is the requirement that the serving of food must be “merely incidental” to the consumption of alcoholic beverages. Section 561.695(5), F.S., defines “merely incidental” as a limit that a stand-alone bar derive no more than 10 percent of its gross revenue from the sale of food. Further, s. 561.695(5)(b), F.S., prohibits stand-alone bars from serving free-food, but does allow customary bar snacks to be served without charge.

Reporting Requirement for Stand-Alone Bars

Every third year after the initial designation and on or before the annual license renewal, a stand-alone bar that serves food, other than pre-packaged items, must file an “agreed upon procedures report” prepared by a Certified Public Accountant with the DABT attesting to the percentage of food sales. The first triennial report is due by September 30, 2006, which is the first applicable renewal date for designated stand-alone bars.

The Florida Institute of Certified Public Accountants (FICPA) has expressed concern regarding the DBPR’s proposed rules regarding the required triennial reports and submission of a procedures report. The FICPA indicates that requiring that CPAs attest to the accuracy and completeness of the records would be extremely costly for the affected businesses. Further, the FICPA believes that a CPA’s performance of an agreed upon procedures report would most likely be a violation of professional standards, and, consequently, the FICPA would be compelled to advise its CPA members to refrain from performing the service for stand-alone bars.

According to the FICPA, in an agreed-upon procedures engagement or report, a certified public accountant (CPA) does not render an opinion regarding the sufficiency of the records provided by the client, including the accuracy and completeness of the records. In the context of the proposed rules, a CPA could only certify that the records provided by the stand-alone bar to a CPA reflect a stated percentage of gross food sales. In an agreed upon procedures report, the CPA would not attest to the completeness or accuracy of the records provided.

Proposed rule 61A-7.005 establishes the requirements for the triennial renewal reports required by s. 561.695(6), F.S., which requires that stand-alone bars must file an agreed upon procedures report prepared by a Certified Public Accountant (CPA). The proposed rules do not define the term “procedures report.” Moreover, s. 561.695(6), F.S., uses the term “agreed upon procedures report,” but it, too, does not define the term. Proposed rule 61A-7.005 requires that the report must provide the actual percentage of food sales for consumption on the premises for the preceding 36-month period from the renewal date, the actual annual percentage for each of the three years, the year total, and the total gross sales revenue from food consumption for each year and the total during that period. The proposed rule does not require that a CPA “attest,” in the agreed upon procedures report, that the establishment has maintained all of the records required by the rule, nor must the CPA attest to the accuracy and completeness of the records used to make the report.

According to the FICPA, a CPA could be disciplined by the Board of Accountancy within the DBPR for a violation of professional standards if, in the course of preparing an agreed upon procedures report, the CPA observes irregularities in the client's records, e.g., that the client is intentionally withholding records from the CPA, or the CPA determines that the client may have committed fraud or other malfeasance, e.g., tax evasion, and does not note them in the report. Moreover, the FICPA asserts that the department should clarify whether a CPA may be disciplined by the board if he or she fails to report fraud or other malfeasance that may be observed by the CPA in the process of preparing the report.

According to the FICPA, the division's rules are not sufficiently clear regarding the specific records a stand-alone bar is required to maintain under the rules. According to the FICPA, the division's rules do not require that a CPA document the findings in the report. According to the FICPA, CPA standards of professional conduct require greater specificity regarding the form in which the records must be kept, e.g., whether a CPA can rely upon records maintained in an electronic format. The FICPA maintains that the rules also need greater specificity regarding the steps or procedures that a CPA must take to address any apparent lack of internal controls that can result in unreliable records. The FICPA recommends that the department's proposed rule should be amended to define the term "procedures report" in a manner consistent with how the term "agreed upon procedures engagement" is defined by the American Institute of Certified Public Accountants Statement on Standards for Attestation Engagements.

Without an adequate resolution of these matters, the FICPA believes that a CPA's performance of an agreed upon procedures report would most likely be a violation of professional standards, and, consequently, the FICPA would be compelled to advise its CPA members to refrain from performing the service for stand-alone bars. The FICPA further asserts that the determination of a stand-alone bar's compliance with the requirements of the act is a function that should more appropriately be performed by the department's own inspectors and auditors.

According to the department, proposed rules have been presented to the Board of Accountancy. The department further notes that its rules remain in the adoption process, and that it intends to consider any concerns and recommendations of the board or the FICPA.

Relevant Proposed Rules

Section 561.695(9), F.S., grants the DABT the authority to adopt rules governing the designation process, criteria for qualification, required recordkeeping, auditing, and other rules necessary for the effective enforcement and administration of the Clean Indoor Air Act.

After adopting its initial emergency rules, the department initiated rulemaking for rules 61A-7.001 through 61A-7.015 on September 29, 2003. These proposed rules pertained to the implementation of the stand-alone bar exception, and established a methodology for determining the percentage of food and alcoholic beverages sold in a stand-alone bar, record keeping requirements, penalty guidelines, and investigative and enforcement procedures.

In *Bowling Centers of Florida, Inc., (Bowling Centers)*, an association representing bowling establishments in Florida, challenged the DPBR's proposed rules 61A-7.003, 61A-7.007, 61A-7.008 and 61A-7.009 as an invalid exercise of delegated legislative authority. On March 26, 2004, an ALJ granted *Bowling Centers* challenge and held that the department had exceeded its grant of rulemaking authority, with the exception of proposed rule 61A-7.003.

Proposed rule 61A-7.004 requires that a designated stand-alone bar must file an annual certification that no more than 10 percent of its total gross revenue is derived from the sale of food for consumption on the licensed premises. The new proposed rule 61A-7.007, which sets forth the formula for determining the percentage of gross food sales revenue, requires that compliance with the 10 percent food limitation must be demonstrated for any consecutive two month period. The earlier invalidated rule required a six-month period of compliance. The constitutional amendment and the act do not specify the period of time during which the incidental sale of food percentage must be calculated.

The new proposed rule 61A-7.008 provides the formula for determining the percentage of gross alcohol sales revenue. This rule also uses a consecutive two-month reporting period. It divides gross revenue from the sale of alcoholic beverages for consumption on the premises by gross total sales revenue.

The DBPR has developed, and noticed for formal rulemaking, a further revision of its proposed rule 61A-7.009. Under the new proposed rule, the formula for determining whether an establishment is predominantly dedicated for the service of alcoholic beverages on the licensed premises is dependent on the type of smoking designation received.

For an “ss” designated establishment in which food service is limited to non-perishable snack foods, an establishment is predominantly dedicated to the service of alcoholic beverages if gross alcohol sales revenue established pursuant to proposed rule 61A-7008, is greater than the revenue from each of the following categories:

- the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises where the purchaser is required to enter the premises,
- the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises where the purchaser is not required to enter the premises, and
- the percentage of gross revenue from any source not included in the alcohol categories above.

For an “ssf” designated establishment in which food service is limited to ten percent of gross revenue, an establishment is predominantly dedicated to the service of alcoholic beverages if gross alcohol sales revenue is greater than the revenue from each of the following categories:

- the percentage of gross food sales revenue from the sale of food the licensee sells for consumption on premises,
- the percentage of gross food sales revenue from the sale of food the licensee sells for consumption off premises,
- the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises, and
- the percentage of gross revenue from any source not included in the food and alcohol categories above.

Signage Requirement

Section 386.206, F.S., (2002), required the posting of a sign in any area that was designated as a smoking area prior to the effective date of ch. 2003-398, L.O.F. Section 386.206(1), F.S., (2004), continues to maintain a requirement for sign posting. It requires that any person in charge of an enclosed indoor workplace who was required before the adoption of the smoking ban in the State Constitution to post a sign under s. 386.206, F.S., to conspicuously post a sign[s] stating that smoking is not prohibited. Section 386.206(5), F.S., provides that this requirement expires on July 1, 2005.

Penalties

Section 386.207(3), F.S., provides penalties for violations of the Clean Indoor Air Act by proprietors or persons in charge of an enclosed indoor workplace. The penalty for a first violation is a fine of not less than \$250 and not more than \$750. The act provides fines for subsequent violations in the amount of not less than \$500 and not more than \$2,000. Penalties for individuals who violate the act are provided in s. 386.208, F.S., which provides penalties in the amount of not more than \$100 for a first violation and not more than \$500 for a subsequent violation. The penalty range for an individual violation is identical to the penalties for violations of the act before the implementation of the constitutional smoking prohibition.

A recent ALJ interpretation questioned whether the civil penalties in s. 386.207(3), F.S., which may be assessed against “the person” who fails to comply with a previously issued “notice to comply,” apply to

corporate or other non-human juridical entities. The ALJ held that, in the context of s. 386.207(3), F.S., the term “person” appears to be limited to an individual human being.

Section 561.695(8), F.S., provides specific penalties for violations by stand-alone bars that range from a warning for a first violation to revocation of the ability to allow smoking on the premises for a fourth violation. The applicable fines range from \$500 to \$2,000.

The Beverage Law² prohibits, as a third degree felony, a person from willfully and knowingly making false entries in required records concerning the alcoholic beverage excise tax. However, there is no comparable provision in s. 561.29, F.S., which provides the grounds for suspension or revocation of an alcoholic beverage license, for willfully or knowingly making false and misleading statements in regards to other reports, e.g. the annual affidavit from stand alone bars regarding food sales, required under the Beverage Law.

Senate Interim Project 2005-156

A recent Senate interim project³ examined the implementation of the smoking ban. The purpose of the project was to study the implementation of the smoking ban to determine any inconsistent or contradictory enforcement provisions and the need to clarify the act to provide necessary guidance to the agencies on the meaning of terms. Another purpose of the study was to identify any unintended consequences of the implementation of the act, including problems and costs to various businesses, and to determine if additional legislative changes are necessary to correct any problems or ambiguity in the law.

The interim project resulted in the following recommendations:

- The Clean Indoor Air Act (Act) should be amended to clarify that local law enforcement officers have jurisdiction to enforce the smoking prohibition in s. 386.204, F.S.;
- The smoking prohibition in s. 386.204, F.S., should be amended to clarify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person, including patrons and employees, to smoke in the workplace;
- The act should be amended to clarify that the term “person,” as used in the act, has the same meaning as in the rule of statutory construction in s. 1.01, F.S.; and
- The Legislature should delay the implementation of the triennial renewal reports required by s. 561.695(6), F.S., by one year in order to permit affected stand-alone bars to adjust the recordkeeping and reporting requirements which have yet to be adopted as rules of the Department of Business and Professional Regulation.

National Register of Historic Places

Section 267.021(5), F.S., defines the “National Register of Historic Places” to mean a list of historic properties significant in American history, architecture, archaeology, engineering, and culture, maintained by the Secretary of the Interior, as established by the National Historic Preservation Act of 1966, as amended.

The National Historic Preservation Act of 1966 authorizes the secretary of the U.S. Department of the Interior to expand and maintain a National Register of Historic Places (NRHP) composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture. The NRHP is administered by the National Park Service, which is part of the U.S. Department of the Interior.

² Chs. 561, 562, 563, 564, 565, 567, and 568, F.S

³ See Committee on Regulated Industries, *Evaluate the Implementation of the Smoking Ban*, Report No. 2005-156, November 2004.

SUMMARY OF LEGISLATION

Smoking Violations by Patrons, Employees and Licensees

The bill amends s. 386.204, F.S., to provide that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace. The bill requires that the proprietor or other person in charge who observes a smoking violation or has been notified of a violation must request that the violator stop smoking and, if the violator does not comply, the bill requires that the violator be required to leave the premises.

The bill provides that the proprietor or other person in charge who fails to comply with this provision is subject to the penalties in ss. 386.207 and 561.695, F.S., as applicable.

The bill amends the penalty provisions in s. 561.695(8), F.S., to apply the penalty provisions for stand-alone bars to alcoholic beverage vendors who permit smoking in alcoholic beverage licensed establishments. Under current law, these penalties only apply to alcoholic beverage vendors who have received a stand-alone bar designation from the DABT.

The bill amends s. 386.203, F.S., to provide that the term “person” has the same meaning as in the rule of statutory construction in s. 1.01, F.S.

Enforcement by Local Law Enforcement

The bill amends s. 386.208, F.S., to clarify that a law enforcement officer may issue a citation to any person who violates the provisions of the Clean Indoor Air Act. The bill specifies the minimum information that a citation must contain, including: the facts constituting the violation; and the procedures to follow in order to pay the fine, contest the citation, or appear in court. The bill provides that any person who fails to comply with the citation shall be deemed to have waived his or her right to contest the citation and the court may issue an order to show cause. The bill also provides that if any person refuses to comply with a proprietor’s request to stop smoking, a law enforcement officer may remove the violator from the premises.

Food Service in Stand-alone Bars

This bill expands the definition of stand-alone bar in s. 386.203, F.S., to include a “licensed premises that derives no more than 20 percent of its gross revenue from the sale of food consumed on the licensed premises” when “the licensed premises is located in a building that is individually listed” in the National Register of Historic Places as defined in s. 267.021, Florida Statutes. Essentially, this bill creates an exemption for licensed establishments located in a building listed individually on the National Register of Historic Places to increase their allowable food sales from 10 percent to 20 percent. The bill creates a window of opportunity to allow businesses that are not currently on the historic register to qualify for the exception by including a provision that the stand-alone bar must have submitted an application seeking the historic designation to the Department of State on or before 90 days after the effective date of this act.

Reporting Requirement for Stand-Alone Bars

A stand-alone bar must continue to submit an affidavit annually which certifies the business has complied with the food sales limitation; however, the bill eliminates the required “agreed upon procedures report” that designated stand-alone bars must now file with the division every three years.

Additionally, the bill amends s. 561.695, F.S., to prohibit vendors from knowingly making a false statement on the annual compliance affidavit. The bill provides that in addition to specified fines, a person who knowingly makes a false statement on the affidavit may be subject to the suspension or revocation of his or her alcoholic beverage license.

Signage requirement

The bill amends s. 386.206, F.S., to delete the signage requirement which is scheduled to expire on July 1, 2005.

The bill is not anticipated to have a significant fiscal impact on state or local revenue expenditures or collections and has an effective date of July 1, 2005.

C. SECTION DIRECTORY:

Section 1: Amends s. 386.203, F.S., and creates a new subsection (6); specifies that the term "person" has the same meaning as in the rule of statutory construction; allows increased food sales in a stand-alone bar located in a building listed individually on the National Register of Historic; makes technical changes and clarifying changes.

Section 2: Amends subsection (1) of s. 386.204, F.S., and creates a new subsection (2) to specify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace; requires that the proprietor must request the violator to stop smoking and require the violator to leave the premises if he or she fails to comply; and provides penalties.

Section 3: Amends subsections (2) and (4) of s. 386.2045, F.S., to conform cross references.

Section 4: Amends subsection (1) of s. 386.205, F.S., to conform a cross reference.

Section 5: Amends s. 386.206, F.S., to delete a provision regarding the posting of signs which is scheduled to self-expire on July 1, 2005.

Section 6: Substantially amends s. 386.208, F.S., to authorize the issuance of citations to violators of the act by a law enforcement officer and specifies the minimum information the citation must contain, including: the facts constituting the violation and procedures to follow in order to pay the find, contest the citation, or appear in court; provides for issuance of an order to show cause for persons who fail to comply with the citation; and provides that if any person refuses to comply with a proprietor's request to stop smoking, a law enforcement officer may remove the violator from the premises.

Section 7: Substantially amends s. 561.695, F.S., increasing the food sales limitation from 10 percent to 20 percent food for certain stand-alone bars; deleting a requirement for submission of an agreed upon procedures report; prohibiting false statements on affidavits; applying the penalty provisions for stand-alone bars to other alcoholic beverage vendors that allow smoking in their licensed establishments; and correcting cross-references.

Section 8: Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None anticipated.
2. Expenditures:
None anticipated.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None anticipated.

2. Expenditures:

This bill may increase expenditures for local governments to the extent they become more engaged in issuance of citations or enforcement for violations of the prohibition on smoking in enclosed indoor workplaces; however, this increased cost is expected to be minimal.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Stand-alone bars, currently required to maintain food sales below the 10 percent threshold established in general law, that will qualify for this exception may experience increased sales due to the availability of smoking in conjunction with food sales in that establishment. Conversely, nearby restaurants or other stand-alone bars that are not allowed increased food sales may see a reduction in sales due to increased competition from the businesses which are qualified to avail themselves of this provision.

According to information received from the Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation, there are currently three buildings in Florida that have a business with an alcoholic beverage license and a registration on the National Register of Historic Places. None of these locations currently holds a smoking designation as a stand alone bar.

D. FISCAL COMMENTS:

A study conducted by the University of Florida to assess the economic impact of the smoking ban on Florida's leisure and hospitality industry found no significant negative affect on that industry.⁴ The study found a statistically insignificant increase in sales by taverns, night clubs, bars, and liquor stores after the smoking ban took effect. The study also did not find evidence of any migration of dining from restaurants to taverns and bar where smoking is permitted because the sales data used from all eating and drink establishments as a whole could not detect such a migration. Further, the study found that there is no quantifiable evidence indicating the number of stand-alone bars that have had to scale back or otherwise limit their food service options in response to the 10 percent food limitation.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or cities to spend funds or take an action requiring the expenditure of funds. This bill does not reduce the authority that cities or counties have to raise revenues in the aggregate. This bill does not reduce the percentage of a state tax shared with cities or counties.

2. Other:

The constitutional amendment defined a stand-alone bar to mean:

“...any place of business devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and that is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue.”

⁴ *The Economic Impact of Florida's Smoke-Free Workplace Law*, Bureau of Economic and Business Research, Warrington College of Business Administration, University of Florida, June 25, 2004.

The constitutional amendment does not define the term “merely incidental.” Section 561.695(5), F.S., defines “merely incidental” to limit a stand-alone bar from deriving more than 10 percent of its gross revenue from the sale of food.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Commerce Council considered HB 1297 on April 14, 2005, adopted one strike-all amendment by Representative Sorensen, and approved the bill with committee substitute.

In addition to the exception allowing increased food-sales for qualifying stand-alone bars created in the original HB 1267, the committee substitute:

- clarifies that local law enforcement officers have jurisdiction to enforce the smoking prohibition in s. 386.204, F.S.;
- clarifies that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person, including patrons and employees, to smoke in the workplace;
- clarifies that the term “person,” as used in the act, has the same meaning as in the rule of statutory construction in s. 1.01, F.S.;
- repealed a requirement for a triennial reports required by s. 561.695(6), F.S., from stand-alone bars;
- prohibits false statements on affidavits;
- provides penalties; and
- corrects cross-references.